No. 20131

In the

United States Court of Appeals

For the Ninth Circuit

SHATTUCK DENN MINING CORPORATION,
Iron King Branch, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Brief of Petitioner

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JURISDICTION

Pursuant to Section 10(f) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.) hereinafter the Act, Shattuck Denn Mining Corporation, Iron King Branch, filed its Petition to Review and Set Aside the Decision and Order of the National Labor Relations Board issued March 31, 1965, against petitioner. (R. 39-42)* By that Decision and Order the Board found petitioner to have violated Sections 8(a)(1) and 8(a)(3) of the Act. (R. 37-38)

Respondent filed its Answer and cross-petitioned to enforce the Order of the Board. (R. 47-48)

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*The Transcript of Record is referred to by referenees in parenthesis to R. The Reporter's Transcript is referred to by references in parenthesis to T.

HISTORY OF THE CASE

These proceedings originated in a charge filed by Local 942 of the International Union of Mine, Mill and Smelter Workers on May 8, 1964, charging that petitioner discharged Nick Olvera because of his union activities. (R. 3) An amended charge was filed by the Union on May 13, 1964, adding a charge that petitioner refused to reinstate a number of employees who had engaged in an unfair labor practice strike. (R. 4)

On the basis of the above charge and amended charge filed by the Union, a complaint was issued on July 1, 1964 in Case No. 28-CA-1085 alleging that petitioner had violated Sections 8(a)(1) and 8(a)(3) of the Act. (R. 5-8) Petitioner filed an Answer denying the commission of any unfair labor practices. (R. 11-12)

A second amended charge was filed by the Union on July 7, 1964, repeating the allegations of the original and first amended charges and adding the charge that petitioner had discharged two employees because of their participation in the strike. (R. 9-10)

A hearing was held before Trial Examiner Louis S. Penfield on August 4 and 5, 1964 in Prescott, Arizona. (R. 11-12) The Trial Examiner found, in his Intermediate Report dated December 17, 1964, that petitioner had violated Section 8(a)(3) of the Act by discharging employees Nick Olvera and Lupe Jaime; that petitioner had engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act in refusing to reinstate certain strikers found by respondent to be unfair labor practice strikers; that petitioner had engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act. (R. 13-33)

The recommended Order of the Trial Examiner, declaring the above-stated matters to be unfair labor practices within the meaning of Sections 8(a)(1) and 8(a)(3) of the Act, was adopted by the Board, and petitioner was ordered to cease and desist from: (a) discouraging Union membership by discharging or otherwise discriminating against employees; (b) interfering with, restraining, or coercing employees in their right to self organization and other Union activities, or to refrain from such activities. Affirmatively, petitioner was ordered to offer reinstatement to employees Olvera and Jaime, with back pay; to offer reinstatement to all strikers denied reinstatement because permanently replaced, with back pay; to post the usual notices and notify the Board of compliance with the foregoing. (R. 37-38)

STATEMENT OF FACTS

Shattuck Denn Mining Corporation, Iron King Branch, (hereinafter referred to as "petitioner" or "Company") has operated an underground lead and zinc mine and mill at Humboldt, Arizona, since approximately 1942. During this period there have been several Unions authorized as bargaining agent to represent the production and maintenance employees of the Company. The Federal Labor Union represented the employees from 1946 to 1958 when the United Steelworkers of America won the bargaining rights. The Steelworkers Union was bargaining agent until April, 1964 when the International Union of Mine, Mill and Smelter Workers (hereinafter referred to as "Union") won the bargaining rights as the result of a National Labor Relations Board election held on March 25, 1964. (T. 13)

Although the Steelworkers contract had been terminated, the Company and Mine-Mill officials agreed on a procedure for handling grievances in steps up to the manager's level. (T. 250-251)

On April 9, 1964, the Union sent a letter to the Company giving the names of 29 employees, out of a total of approximately 300 employees, who had been elected to serve as temporary officers and stewards. (General Counsel's Exhibit No. 8) A short time later the Company was given the names of three or four more stewards. (T. 61, 193-194)

Six or seven grievances were filed during the weeks following Mine-Mill's certification and were handled in the routine manner.

On April 22, 1964, at the conclusion of a General Manager's hearing to discuss a number of safety grievances, Union President Covey handed Manager Dan Kentro and Acting Mine Superintendent Curtis Sundeen a grievance which alleged:

> "Foreman using abusive language and threatening complainant, an officer and steward of local union. Union requests that this foreman be reprimanded and this practice stopped immediately." (General Counsel's Exhibit No. 2)

This grievance was not discussed at that time but was investigated during the next few days by Manager Kentro. Acting Mine Superintendent Sundeen was directed to look into the grievance and he obtained a written statement from the Supervisor involved, Shift Boss Derek Channon. During the course of his investigation, Manager Kentro learned that Shift Boss Channon, who had been a boss for only two or three months, had given an order to Shaft Leadman Tony Portugal to blast a missed hole in the shaft, whereupon Portugal's partner, Shaftman Nick Olvera, said "No, no, no" indicating that he did not want to comply with the order to blast. (Before the Trial Examiner, Olvera for the first time injected that he also said "lunch time", meaning he wanted to wait until then.) (T. 20-22, 265-266)

Upon having his direction to Shaft Leadman Portugal countermanded, Channon and Olvera had an exchange of words and Olvera was assigned to clean ditches and break boulders on the grizzly. The blast was delayed for approximately an hour. (T. 155)

Manager Kentro scheduled a hearing on the grievance on April 28, 1964. At the grievance meeting on April 28, 1964, Mr. Kentro advised the Union that it appeared that something much more serious than the original grievance was involved, as the facts indicated that Nick Olvera had been guilty of insubordination. The incident was thoroughly discussed at that time and all of the principals, Olvera, Portugal and Channon, were present and gave their versions of what had occurred.

Upon hearing the evidence, Mr. Kentro stated that it seemed obvious that Olvera had interfered with the Shift Boss' order and that the blast was delayed for approximately an hour because the supervisor's direction had not been carried out. Therefore, Mr. Kentro concluded that Mr. Olvera's action amounted to insubordination, a dischargeable offense. (T. 266-270)

Mr. Kentro said he would consider the case overnight, which he did, and Olvera was given his discharge slip on April 29, 1964. (T. 270) (General Counsel's Exhibit No. 6)

Later that same day a grievance was filed by the Union on behalf of Olvera. The nature of the grievance alleged: "Unjust discharge of Nick Olvera." The remedy sought was: "Reinstatement with full back pay and all rights restored." (General Counsel's Exhibit No. 7)

A grievance meeting was scheduled by Union and Company representatives for May 4, 1964 to discuss the discharge.

In the meantime, rumors were going around the mine that some of the employees might try to stop the operation; so on May 1 Manager Kentro posted a notice advising that operations and production would continue at the Iron King, and that, unless employees had excused absences, they would be considered as having quit and would be dropped from the payroll. (General Counsel's Exhibit No. 9)

A hearing on the grievance arising out of the discharge was conducted on May 4, 1964 and the facts were discussed between Management and union representatives. Both the grievant, Olvera, and his partner, Anthony Portugal, were present and gave their versions of the incident. The union representatives argued that Olvera had not been insubordinate, but did not argue or even suggest that the reason for the discharge was for union activity. At the conclusion of the hearing, General Manager Kentro said that nothing had been brought out which had not already been fully considered, and that his decision was to deny the grievance.

The next morning, with no advance notice to the Company, the Union established a picket line at the entrance to the mine.

On May 7, Mr. Kentro sent letters to all employees advising them that the Company would continue to operate and that replacements would be hired. (Respondent's Exhibit No. 8) The letters to all employees also stated that they would be reinstated if their jobs had not already been filled. Similar statements were made by public announcements in the local newspaper. (Respondent's Exhibit No. 9)

Also, the Company placed advertisements in the newspapers and on radio for job applicants.

On May 8, 1964, a charge was filed by the Union on behalf of Mr. Olvera alleging that he was discharged—

"* * * because of his union activities in support of the International Union of Mine, Mill and Smelter Workers before a National Labor Relations Board election that took place on March 25, 1964, and activities as Union Steward and local union officer." (General Counsel's Exhibit 1(a)) (R. 3)

On May 11, a meeting was scheduled in Phoenix by the Federal Mediation and Conciliation Service in an attempt to settle the strike, but after more than two hours of talks the parties adjourned with no acceptable solution.

The strike ended abruptly the next day, on May 12, when the striking employees, again without advance notice to the Company, offered to return to work. During the strike the Company had continued to operate and many employees remained at work. Also, during the period, the Company hired twenty-three permanent replacements to fill vacancies in the mill and underground caused by the absent strikers. When the strike ended, five mill employees, whose jobs had been permanently replaced, were refused reinstatement and fifteen employees in the lowest classification underground, whose jobs had been filled, were refused reinstatement. (T. 286-287)

On May 9, while the strike was still in progress, Mr. Jack Pierce, the Company's Superferrite Plant Manager, received a telephone call intended for General Manager Kentro. The call was from Mrs. Ernest Rivera, who reported that her husband had been threatened by Mr. Lupe Jaime. Mr. Pierce got word to Manager Kentro of this telephone call and Mr. Kentro went to the Rivera home and talked to Mr. and Mrs. Rivera, who both stated that Mr. Lupe Jaime had been to see Mr. Rivera earlier that day to find out why Rivera "didn't stick with us". When Mr. Rivera said he had eight children and was going to work so long as the Union

had no contract with the Company, Mr. Jaime said that if he continued to work he would get beaten up. (T. 302)

Mr. Kentro suggested that Mr. Rivera get a lawyer and file criminal charges against Mr. Jaime, but Rivera said he did no want to go that far. On May 12, upon his return to work, Mr. Jaime was given a letter signed by Manager Kentro notifying him that he was discharged for his misconduct on May 9, 1964. (General Counsel's Exhibit No. 10)

Mr. Jaime did not question the discharge at the time and did not file a grievance with the Company.

On May 13 the charge against petitioner was amended to include employees alleged to have been refused reinstatement, including Mr. Jaime. (R. 4)

QUESTIONS PRESENTED

The questions involved are:

1. Whether, by discharging Nick Olvera, petitioner engaged in unfair labor practices within the meaning of Section 8(a)(1) and Section 8(a)(3) of the Act.
2. Whether, by refusing to reinstate the strikers who had been permanently replaced during the strike, petitioner engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
3. Whether, by posting the notice on or about May 1, 1964, petitioner has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. Whether by discharging Lupe Jaime, petitioner engaged in unfair labor practices within the meaning of Section 8(a)(1) and Section 8(a)(3) of the Act.

STATUTES AND RULES INVOLVED

Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, as amended, insofar as pertinent, provide:

> "(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:" (61 Stat. 140, 29 USC Sec. 158(a)(1) and Sec. 158(a)(3)

Section 10(c) of the Act provides:

> "(c) . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." (61 Stat. 146, 29 USC Sec. 160(c))

SPECIFICATIONS OF ERROR

1. The National Labor Relations Board erred in finding and concluding that the discharge of Nick Olvera was discriminatory within the meaning of Section 8(a)(3) of the Act and that by discharging Nick Olvera, petitioner engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

2. The National Labor Relations Board erred in finding and concluding that by posting the notice on May 1, 1964, petitioner interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act.

3. The National Labor Relations Board erred in finding and concluding that the strike beginning May 5, 1964 was an unfair labor practice strike and by refusing to reinstate

those strikers unconditionally offering to return to work because replacements had been hired, petitioner engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. The National Labor Relations Board erred in finding and concluding that petitioner discharged Jaime for engaging in protected strike activity and, in discharging him, petitioner violated Section 8(a)(3) of the Act.

5. The National Labor Relations Board erred in finding and concluding that, by interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, petitioner has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The National Labor Relations Board erred in entering its order and any remedy against petitioner.

7. The National Labor Relations Board erred in failing to dismiss the complaint against petitioner in its entirety.

SUMMARY OF ARGUMENT

Respondent bases its findings and conclusions that Nick Olvera was discharged for his union activities on inferences, alone, and not on substantial evidence. Petitioner has the right to discharge employees for cause. Olvera was discharged solely because of insubordination. The General Counsel has the burden of proving by the preponderance of evidence that petitioner's conduct in discharging Olvera was for anti-union motives. There was no such evidence shown here. The fact that Olvera may have engaged in union activities is not enough to warrant that he was discharged for such activities. The evidence fails to show a discriminatory discharge. This is not an arbitration case, nevertheless the Trial Examiner attempts to act as an

arbitrator and substitute his judgment for management's as to proper discipline.

Olvera's discharge was not an unfair labor practice; consequently, the strike to protest his discharge was not an unfair labor practice strike, but, rather, was an economic strike. Petitioner had the right to replace economic strikers with permanent employees and does not have to discharge them to make room for returning strikers.

The notice posted by the Company was not a violation of the Act and had no effect on either Olvera's discharge or the strike. Petitioner repudiated the notice by advising each employee personally that his job was available if a permanent replacement hadn't been hired.

Jaime was discharged because of his illegal activities in threatening a fellow employee during the strike.

The activities of petitioner do not tend to lead to labor disputes obstructing commerce, and no remedy should have been ordered. Instead, the complaint, as amended, in this case should have been dismissed in its entirety.

ARGUMENT

1. The Discharge of Nick Olvera.

This case centers around the discharge of Nick Olvera. In considering his discharge it is well to remember that the Act was not designed to interfere with the rights of employers to control employment conditions in the absence of anti-union motivation. "The Act", the Supreme Court has stated, "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them." *N.L.R.B. v. Jones & Laughlin Steel Co.*, (U.S. Sup. Ct. 1937) 301 U.S. 1, 81 L.Ed. 893, 57 S.Ct. 615.

"The Act permits the discharge for any reason other than Union activity or agitation for collective bargaining."

Associated Press v. N.L.R.B., (U.S. Sup. Ct. 1937) 301 U.S. 103, 81 L.Ed. 953, 57 S.Ct. 650. In general, therefore, a complete defense exists under the Act if the employer can show that the allegedly discriminatory conduct was motivated not by anti-union considerations, but by reasons normally associated with the efficient conduct of his business.

The Act, itself, reaffirms the employer's right to discharge or otherwise discipline employees "for cause". Section 10(c) specifically provides that the Board may not order reinstatement or back pay with respect to employees who have been discharged "for cause".

It goes without saying that the General Counsel has the burden of proving affirmatively by substantial evidence that petitioner's conduct in discharging Olvera was motivated by anti-union considerations. *N.L.R.B. v. Montgomery Ward & Co., Inc.,* (8 Cir. 1946) 157 F.2d 486. It is not up to the defendant to prove non-discrimination. *Indiana Metal Products Corp. v. N.L.R.B.,* (7 Cir. 1953) 202 F.2d 613.

Substantial evidence means such evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co. v. N.L.R.B.,* (U.S. Sup. Ct. 1938) 305 U.S. 197, 83 L.Ed. 126, 59 S.Ct. 206.

It is settled that when an employee is discharged for reason of his union activities it makes no difference whether he is also guilty of insubordination. The discharge is a violation of Section 8(a)(3) of the Act. Petitioner does not quarrel with the Board's contention that the law is violated if insubordination is used as a pretext for discharging a union adherent, but petitioner urges that there is no competent evidence in this case to support a finding that Olvera was unlawfully discharged on the basis of a pretext.

The facts show that Olvera was insubordinate. His Shift Boss had given a direct order and Olvera countermanded his order. The record is clear that such an incident occurred. Clearly, Olvera interfered with the Shift Boss' order; the Boss got the impression that his orders were countermanded by Olvera; and the blast was delayed, slowing progress in the shaft.

Upon learning of this incident, Manager Kentro discharged Olvera for insubordination—*and for no other reason.* The important thing here is that *management believed Olvera had been insubordinate.* Kentro genuinely felt that Olvera had attempted to break down the authority of a new boss. He testified:

> "* * * it seems to me some misunderstanding regarding the authority of the shift bosses, I just wanted to be sure this was clear in everybody's mind, and I outlined the shift bosses were supervisors acting for management on the property and their orders were to be obeyed."
>
> "* * * from all that I could find out and had been able to find out, that Mr. Olvera had interfered with the orders given by the shift boss, that in effect by changing the orders he had not only interfered with the orders of the shift boss but he held up another man from doing his job." (T. 261-262)

There are numerous arbitration awards sustaining discharges in similar instances. Insubordination does not have to follow a "pattern", as suggested by the Trial Examiner. (R. 22) Nor does it have to be accompanied by expressions of "defiance". (R. 22) It may consist of an argumentative reluctance to work. Many arbitrators have ruled that an industrial plant is not a debating society and refusal to obey an order *promptly* is insubordination.

This, of course, is not an arbitration case; however, we feel that the facts show that Olvera was insubordinate and that management had reasonable grounds to believe he was insubordinate.

We submit that it was error as a matter of law for the Board to ignore this and look further for motives for his discharge. There is positive, uncontroverted testimony from Manager Kentro, who made the decision to discharge Olvera, that his union activities had nothing whatsoever to do with his discharge. (T. 270) At the hearings conducted on April 28 and May 4, there had been no mention of discrimination, but the dispute centered entirely around the insubordination incident itself and whether the penalty should be so severe.

In finding that petitioner was in violation of Section 8(a)(3) of the Act, the Board rejected Manager Kentro's testimony entirely and concluded that Olvera was discharged for his union activity.

The Trial Examiner has based his findings and conclusions on inferences alone. He finds that petitioner *must have* committed an unfair labor practice by discharging Nick Olvera because he was a temporary union officer. He finds that petitioner *must have* had an illegal motive because to him the penalty for the offense seems too severe and would "serve as a warning to the Union," * * * "and at the same time challenge and weaken it." (R. 25) He accepts as fact a statement of one witness, who testified that Manager Kentro stated at a grievance meeting that the Union was filing too many trivial grievances, so finds that the Company *must have* discharged Olvera because he filed grievances.

Olvera had not been active for Mine-Mill in the organizational campaign insofar as the Company knew. (T. 270) Mr.

Olvera, himself, admitted he had not been very active in the campaign and he didn't know if the Company management even knew which side he favored. (T. 68) His partner stated that Mr. Olvera had not been particularly active during the recent National Labor Relations Board election. (T. 157) The Company has never taken sides in representation elections and management had kept strictly neutral in the recent election involving Mine-Mill and the Steelworkers. (Respondent's Exhibits 1, 2 and 3)

The fact that Olvera had been named a temporary union officer had absolutely nothing to do with his discharge. Olvera had previously been a union officer with the Steelworkers Union and handled numerous grievances with the Company over the past years. He has also been on negotiating committees with the predecessor Union. (T. 11, 65-67) So, it is not surprising that he would continue to act as Steward or officer for the newly certified Mine-Mill Union.

Olvera assisted in presenting grievances for the Union along with several other employees. However, the Chairman of the Grievance Committee, Local President and other employees did as much or more in presenting grievances for the Union as did Olvera. There had been no animosity between management and Mr. Olvera during any grievance meetings he attended either before or after Mine-Mill became certified. His relations with management have always been excellent. (T. 66, 271) The fact that the Company and the Union, including Mr. Olvera, were getting along well is evidenced by a letter from Olvera and the safety committee delivered to Kentro on April 28, stating their appreciation for Kentro's cooperation. (Respondent's Exhibit No. 5) Thus, it can be seen that there was no motive for the Company to discharge Mr. Olvera because of his activi-

ties in handling grievances, or for his alleged activities in the representation election.

An employee's "union activity", in itself, is no bar to discharge so long as the discharge is not motivated by a desire to encourage or discourage union membership, or to discriminate for such union activity.

This Court has said:

> "Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantiated to support a finding. The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as a result of such activities. There must be more than this to constitute substantial evidence." *N.L.R.B. v. Citizens-News Co.,* (9 Cir. 1943) 134 F.2d 970, 974.

Similarly, in *N.L.R.B. v. Montgomery Ward & Co., Inc.,* supra, the Court said:

> "Fragmentary and unrelated suspicions are not sufficient in substance to transform a proper exercise of discharge into an improper one. American Smelting & Refining Co. v. N.L.R.B., (8 Cir. 1942) 126 F.2d 680; N.L.R.B. v. Sheboygan Chair Co., (7 Cir. 1942) 125 F2d 436."

In *N.L.R.B. v. McGahey,* (5 Cir. 1956) 233 F.2d 406 at page 413, the Court said:

> "The employer does not enter the fray with the burden of explanation. With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was its cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful

> motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one. * * *"

Similarly, see *N.L.R.B. v. Rickel Bros., Inc.,* (3 Cir. 1961) 290 F.2d 611.

This case comes squarely within the purview of the recent case of *N.L.R.B. v. Ace Comb Company,* (8 Cir. 1965) 342 F.2d 841 at page 847, where it was held that the N.L.R.B is not justified in drawing an inference that an employee was discharged by reason of his union activities where lawful cause existed for the discharge of the employee.

> "It has long been established that for the purpose of determining whether or not a discharge is discriminatory in an action such as this, it is necessary that the true, underlying reason for the discharge be established. That is, the fact that a lawful cause for discharge is available is no defense where the employee is *actually* discharged because of his Union activities. *A fortiori,* if the discharge is *actually* motivated by a lawful reason, the fact that the employee is engaged in Union activities at the time will not tie the employer's hands and prevent him from the exercise of his business judgment to discharge an employee for cause. Fort Smith Broadcasting Co. v. N.L.R.B., 341 F.2d 874 (8 Cir. 3/4/65). * * * It must be remembered that it is not the purpose of the Act to give the Board any control whatsoever over an employer's policies, including his policies concerning tenure of employment, and that an employer may hire and fire at will for any reason whatsoever, or for no reason, so long as the motivation is not violative of the Act."

The Trial Examiner speculated that the April 21 incident would not even have come to light if the abusive language grievance had not been filed. (R. 25) The fact that the manager learned of Olvera's insubordination after a griev-

ance had been filed is incidental. It could have come from any other source and the results would have been the same. Channon, the Shift Boss, had just been made a boss by promotion from the bargaining unit. (T. 267-268) If he had been an experienced supervisor and taken immediate disciplinary action at the time, the Union would have doubtless asserted that his action was hasty and would have filed a similar unfair labor charge as here in order to force the Company to reduce the penalty.

The Trial Examiner found that this grievance was the "last of a series filed in rapid order by the newly certified Union." (R. 25) There is no evidence that this was the last of a series of grievances, or even that there had been a large number of grievances filed. Actually, the Union had filed only six or seven grievances since certified.

The Trial Examiner concluded that Manager Kentro was displeased at the Union for filing too many small grievances. (R. 25). The record on this points shows that one witness, Portugal, commented that "He said we was turning in too many grievances, small grievances that didn't amount to much, or something like that, and he didn't like it." (T. 136) The Trial Examiner attaches the utmost weight and credibility to this isolated statement in the record. However, the answer by Portugal was not responsive to the question asked and was not given any particular significance during the hearing. It was not pursued further by Counsel for General Counsel, either from this witness or from Olvera or from any others.

Portugal's testimony was shown to be unreliable. He stated that Channon had been a boss for two or three years and that he had worked for Channon for eight months, when, in fact, Channon had only been a boss for slightly more than two months. (T. 157, 267-268)

Olvera and Union President Covey went into detail concerning the grievance meeting of April 28th and neither of these principal witnesses made any mention of Kentro having said too many trivial grievances had been filed, even though both were asked to state specifically what Kentro had said. (T. 37-47, 177-180)

Furthermore, even if Kentro had made such a statement, it would not establish any hostile motive. No reasonable inference of opposition to the Union or particularly to Olvera can be drawn from this isolated testimony from Portugal. It is not "substantial evidence". There is no evidence that there was any threat or anger attached to the alleged statement. If such a statement had been made it would merely show an expression from Manager Kentro that he thought some grievances were trivial, which they well might have been. This doesn't establish an illegal motive! The Act certainly does not forbid honest and forthright expression or discussion between company and union representatives. This Court, in *Wayside Press v. National Labor Relations Board,* (9 Cir. 1953) 206 F.2d 862 at page 864, quoted with approval the following statement from *Sax v. N.L.R.B.,* (7 Cir. 1948) 171 F.2d 769, 773:

> "Mere words of interrogation or perfunctory remarks not threatening or intimidating in themselves made by an employer with no anti-union background and not associated as a part of a pattern or course of conduct hostile to unionism or as part of espionage upon employees cannot, standing naked and alone, support a finding of a violation of Section 8(1)."

Inference piled on an inference is not a substitute for evidence. *N.L.R.B. v. Miami Coca-Cola Bottling Company* (5 Cir. 1955) 222 F.2d 341, 344. Furthermore, the Board cannot create inferences where there is no substantial evi-

dence upon which they may be based. *N.L.R.B. v. Kaiser Aluminum & Chemical Corp.,* (9 Cir. 1954) 217 F.2d 366.

As we have mentioned, this is not an arbitration case. Nevertheless the Trial Examiner set himself up as an arbitrator of the proper punishment to be administered Olvera. He saw the incident of insubordination as "relatively minor". (R. 26) In the words of the Trial Examiner, Manager Kentro "readily could have made his point by a lesser penalty." (R 25) In effect, the Trial Examiner admits that some lesser penalty might have been proper, but not discharge. On this point, the Court in *N.L.R.B. v. Ace Comb Company,* supra, said (342 F.2d 841 at page 847):

> "In this connection, we, of course, disregard the Examiner's findings as to the severity of the action in relation to Woodliff's behavior, and say, once it is determined that disciplinary action is warranted the extent of the action taken is purely within the discretion of the employer, and the Board may not substitute its judgment for that of the employer."

The Trial Examiner has attempted to substitute his judgment for the judgment of employer as to proper discipline although the courts have held that such is not permissible. For instance, it has been held that the Board may not limit an employer's right to discharge by holding that the misconduct alleged as grounds for the employee's discharge was excusable or that the discharge was too severe a penalty, *N.L.R.B. v. Coats & Clark, Inc.,* (5 Cir. 1956) 231 F.2d 567, and that the N.L.R.B. may not substitute its judgment for that of an employer as to sufficiency of cause of discharge. The decision of whether or not to discharge an employee is up to management. *Osceola County Cooperative Creamery Association v. N.L.R.B.,* (8 Cir. 1958) 251 F.2d 62. In *N.L.R.B. v. Montgomery Ward & Co.,* supra, (157 F.2d 486 at page 490) the Court held,

"* * * In considering the propriety of these discharges the question is not whether they were merited or unmerited, just or unjust, nor whether as disciplinary measures they were mild or drastic. These are matters to be determined by the management, the jurisdiction of the Board being limited to whether or not the discharges were for union activities or affiliations of the employees."

In this connection, the following quotation from *N.L.R.B. v. McGahey,* supra, is pertinent (233 F.2d 406 at pages 412-413):

"The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretence, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids."

The Trial Examiner concludes that the discharge "was to discourage the Union's continued filing of grievances and its aggressive pursuit of bargaining." (R. 26) His conclu-

sions are based on suspicion alone without any foundation in the record. Contrary to Trial Examiner's findings, there was no "aggressive pursuit of bargaining" at this time. In fact, bargaining had not begun, and had not even been requested yet by either party and negotiations for a written agreement were *not* under way. (T. 50)

The entire record clearly establishes that *there has never* been the presence of an anti-union attitude in petitioner's history. The Company has always remained entirely neutral in union organizational campaigns and Kentro, personally, has never displayed any anti-union sentiment in all his mining career. (T. 246-250) He had no disputes with either the Mine-Mill Union or with Olvera personally, and, in fact, Kentro and Olvera were good friends. (T. 66, 271)

The employer is entitled to have its conduct considered in the light of this history, with its complete absence of hostility to the Union, *Pacific Gamble Robinson Co. v. N.L. R.B.,* (6 Cir. 1950) 186 F.2d 106.

In the case of *N.L.R.B. v. Huber Motor Express, Inc.,* (5 Cir. 1955) 223 F.2d 748, the Court ruled that the Board may not infer an unlawful motive for employer's conduct if it could just as reasonably infer a lawful motive. The fact that Olvera was shown in the hearing to have engaged in union activities prior to his discharge is not enough, in itself, to support a finding by the N.L.R.B. that he was discriminatorily discharged. In *N.L.R.B. v. Arthur Winer, Inc.,* (7 Cir. 1952) 194 F.2d 370, wherein it was held that in the absence of evidence of anti-union background a finding that employees were unlawfully discharged was not justified where causes for the discharges alleged by the employer were adequate to justify discharges, the employer believed that such causes existed, and other employees who had engaged in union activities had not been discharged.

Respondent completely ignored one of the most significant factors in refuting any inference of illegal motive. That is, *the Union representatives at no time prior to the strike ever accused the Company of discriminating against Olvera for any alleged union activities.*

The grievance following Olvera's discharge gave as the nature of the grievance only: "Unjust Discharge of Nick Olvera." (General Counsel's Exhibit No. 7) No claim was made that the discharge was discriminatory.

At the hearing, preceding the discharge on April 28, and again at the meeting between Company and Union officials to review the case on May 4, there was no assertion that Mr. Olvera was discharged for union activity. The case was a dispute strictly on the merits of whether or not Mr. Olvera's actions amounted to insubordination and whether discipline so severe as discharge was warranted. The Union suggested at the hearing of May 4, 1964, that there might have been a "misunderstanding" of the order from the Supervisor, but not that there had been any discrimination. (T. 273) Manager Kentro testified that there had been no mention of union discrimination. (T. 279) Union President Covey's testimony during the hearing confirms this.

> "Q. At the meetings that you attended prior to the time of the strike, was there any discussion whatsoever that Mr. Olvera was being mistreated because of any alleged Union activities?
>
> A. No, there wasn't.
>
> Q. There was no mention of that?
>
> A. No mention.
>
> Q. Did you as president of the Union and the Union in turn feel that Mr. Olvera actually hadn't countermanded his boss and therefore was unjustly discharged and that that was the reason you struck?
>
> A. That's the reason we struck because we thought he was unjustly discharged.

Q. And when you said 'unjustly discharged', you used that in your grievance, you felt that he hadn't been insubordinate isn't that the case?

A. He hadn't been insubordinate.

Q. I refer to Exhibit No. 7, your name appears as signing General Counsel's Exhibit No. 7, have you got it there?

A. This is it.

Q. The nature of the grievance is spelled out, unjust discharge of Nick Olvera. Was it your intention, speaking now as president of the Union, that he wasn't guilty of insubordination?

A. That's true. He was not guilty.

Q. Now, is that solely the reason why the Union struck?

A. That is the reason the Union struck." (T. 202-203)

Olvera, himself, testified that insubordination was the sole issue discussed during the processing of the grievance and no allegation of discrimination was ever raised. (T. 78-81)

The Trial Examiner chooses to disregard this testimony with the statement—"An unjust discharge may or may not be unlawful, but the manner in which persons not versed in *legal niceties* characterize it is not determinative." (R. 25) We point out that during the meetings with the Company on the grievance, the Union had present not only its local officers, but representatives of the International Union as well. These experienced Union representatives may not be "versed in legal niceties", but if they had any thoughts whatsoever that discrimination was the basis for the discharge they would have immediately accused the Company of discrimination, and *in no uncertain terms*. However, the belated accusation of discrimination came several days after the strike, when the Union representatives realized their

attempt to force the Company to reduce the penalty had failed.

There being no substantial evidence to support the Board's findings, its Decision and Order should be set aside. The landmark case on the substantiality of evidence requirements is *Universal Camera Corp. v. N.L.R.B.,* (U.S. Sup. Ct. 1951) 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456. The findings of fact made by the Board must be "supported by substantial evidence on the record considered as a whole. * * *"

Where substantial evidence is not in the record, the Board's order should be set aside. In *N.L.R.B. v. Audio Industries, Inc.,* (7 Cir. 1963) 313 F.2d 858, the 7th Circuit applied the standards laid down by the Supreme Court in *Universal Camera Corporation v. N.L.R.B.,* supra, and rejected the Trial Examiner's findings as to discriminatory discharge of five employees as being unsupported by substantial evidence in the record as a whole. In denying enforcement of the Board's Order, the Court held that the Board was not warranted in finding violation of the Act where the Trial Examiner and the Board erred in ignoring largely uncontroverted testimony as to legitimate reasons for discharges and in substituting their judgment for what are basically managerial decisions, and, furthermore, in basing findings upon two isolated incidents of dubious significance that supposedly demonstrated the employer's anti-union bias.

In *Farmers' Co-operative Co. v. National Labor Relations Board,* (8 Cir. 1963) 208 F.2d 296, the Court, after examining the holding of the Supreme Court in *Universal Camera Corporation v. N.L.R.B.,* supra, concluded, at page 299,

> "We are not barred from setting aside the Board's decision if we 'cannot conscientiously find that the evi-

dence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view'."

The Court denied enforcement of the Board's order, saying,

"A fair consideration of the record is convincing that the finding that petitioner violated Section 8(a)(1) of the Act and/or Section 8(a)(3) is not supported by 'substantial evidence on the record considered as a whole'."

It is urged that there is not substantial evidence in the record considered as a whole on which to base a lawful finding that Olvera was discharged for union activities.

2. The Notice Posted by Petitioner.

There was no anti-union motive behind the notice to employees which Manager Kentro posted on May 1, 1964.

Following Mr. Olvera's discharge on April 28, 1964, there were rumors that some individuals might attempt to stop the operation of the mine. So, on May 1, 1964, Mr. Kentro posted a notice stating that he had heard such rumors and advising that the Company would continue operations and production. The notice went on to state that employees were expected to report for work and employees who failed to report for work would be considered as having quit and would be dropped from the payroll. (General Counsel's Exhibit No. 9)

The Trial Examiner finds that the notice constituted an unlawful threat of discharge to employees who were considering a strike. (R. 27) The evidence shows there was no discussion of the Union calling a strike until several days after the notice, and even then the Company had not been

advised by the Union that there would be a strike. (T. 293, 295) The fact that a few employees might take it upon themselves to "stop production" is not the same as concerted strike action by the Union. Manager Kentro testified that the purpose of his notice of May 1 was to let these employees know that the employer would strictly enforce its absenteeism rules. It contained no threat to discharge anyone for participating in a strike.

The Trial Examiner says "we must consider its effect in terms of its impact on employees contemplating a strike." There is no evidence that anyone paid any attention to the notice and it had absolutely no effect on the employees' determination to go on strike. Furthermore, the Trial Examiner overlooks the fact that at the time the notice was posted (May 1), the Olvera grievance was still being processed. A grievance meeting had been scheduled for May 4 at the General Manager's level to discuss the discharge, in keeping with the agreement between the Company and the Union that grievances would continue to be handled as they had in the past under the Steelworkers contract. Any contemplated strike at that time, prior to exhausting the grievance procedure, would certainly have been in violation of this agreement.

If it were argued that the notice was technically a violation, the Company in effect repudiated the notice on May 5, the day the strike began, by making its position very clear in letters to each employee, newspaper ads and via radio that the employees' jobs were available, provided the Company hadn't permanently filled them. (T. 280-282) (Respondent's Exhibit No. 8) See *Kansas Milling Co. v. N.L.R.B.*, (10 Cir. 1950) 185 F.2d 413.

3. Replacement of Economic Strikers.

As we have pointed out, contrary to the finding of the Trial Examiner and Respondent, the discharge of Olvera was not discriminatory and was not an unfair labor practice. Consequently, the strike was not an unfair labor practice strike. Rather, it was a strike to force the Company to lessen the discipline against Olvera. Not having been caused or prolonged by an unfair labor practice, the strike was an economic strike.

The law is clear that the employer has the right to replace economic strikers with other permanent employees, and does not have to discharge them to make room for the returning strikers. See *Kansas Milling Co. v. N.L.R.B.,* supra; *N.L.R.B. v. Mackay Radio & Telegraph Co.,* (U.S.Sup.Ct. 1937) 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381. The discharge of Olvera was not an unfair labor practice and the strike following was not an unfair labor practice strike. The petitioner, therefore, was under no obligation to discharge the permanent replacements in favor of the returning strikers.

Again we note that at no time prior to the filing of the charge by the Union had it ever been suggested that Olvera was discharged for his union activity, or that the strike was to protest a discriminatory discharge.

There is a question whether the striking employees here were even engaging in a protected concerted activity when they struck, inasmuch as they gave no notice of such intention to strike. See *N.L.R.B. v. Washington Aluminum Co.,* (4 Cir. 1961) 291 F.2d 869.

4. The Discharge of Lupe Jaime for Misconduct.

Lupe Jaime was discharged for misconduct in connection with the strike. The evidence shows that he went to

see Ernest Rivera to find out "why he didn't stick with us." His statements to Rivera were to the effect that Rivera would get beaten up if he continued to work.

At the time of the incident the Riversas went out of their way to report it to management. Manager Kentro talked to the Riveras and there was no doubt at that time that Jaime had, in fact, threatened Rivera. Jaime was not discharged for his strike activity, and Kentro did not use the threat "as a pretext to retaliate against him as a striker" as found by the Trial Examiner. (R. 28) He was discharged because he, in fact, threatened a co-worker. There certainly was no possible motive shown to retaliate against him. Jaime was a very competent miner, who had little or nothing to do with the strike. (T. 228)

The law is well established that the employer has the right to refuse reinstatement when the striker has actually been guilty of misconduct during a strike. *N.L.R.B. v. Fansteel Corporation,* (U.S.Sup.Ct. 1938) 306 U.S. 240, 258, 59 S.Ct. 490, 83 L.Ed. 627; *N.L.R.B. v Thayer Co.,* (5 Cir. 1954) 213 F.2d 748. Jaime's conduct was coercive in nature and calculated to instill fear of physical harm in the non-striker victim, Rivera. Such activity is not protected under the Act. In this case there was an effective implied threat of bodily harm. This was not a case of honest but mistaken belief that the employee had been guilty of misconduct, as was *N.L.R.B. v. Burnup and Sims, Inc.,* (U.S. Sup.Ct. 1964) 379 U.S. 21, 85 S.Ct. 171, 13 L.Ed. 2d 1.

CONCLUSION

Congress intended that the rights of the employer be as jealously guarded as those of the employee. Petitioner is a small mining company with an unblemished history of excellent labor relations and this history should be given

the utmost consideration. There should be a presumption that Petitioner acted lawfully with the burden on the General Counsel to prove affirmatively by substantial evidence otherwise. This has not been established.

For the foregoing reasons, it is respectfully submitted that the Board's Decision and Order be set aside and the Complaint issued in this case be dismissed in its entirety.

Respectfully submitted,

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Dated: September 1, 1965

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RALPH B. SIEVWRIGHT

(Appendix Follows)

Appendix

INDEX TO EXHIBITS

General Counsel's Exhibits	Marked	Identified	Offered	Received
1 (a) (b) (c) (d) (e) (f) (g) (h) (i) (j)	4	4	4	4
2	25	26	26	27
3	27	28	28	29
4	30	30	30	31
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6	47	48	48	48
7	50	51	51	51
8	61	61	61	61
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10	219	219	219	219

Respondent's Exhibits	Marked	Identified	Offered	Received
1	246	246	247	247
2	247	248	248	248
3	248	249	250	250
4	251	251	252	252
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